

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 24035-5-III
)	(consolidated with
Respondent,)	No. 25010-5-III)
)	
v.)	
)	
RALPH HOWARD BLAKELY,)	
)	Division Three
Appellant.)	
)	
<hr/> In the Matter of the Personal Restraint)	
Petition of:)	
)	
RALPH HOWARD BLAKELY, JR.)	
)	UNPUBLISHED OPINION
Petitioner.)	
)	

SCHULTHEIS, A.C.J. — Ralph Howard Blakely was charged in Grant County with soliciting a man to kill Mr. Blakely’s ex-wife and daughter. He strenuously—but unsuccessfully—opposed the Grant County venue. After a jury trial, he was convicted of both crimes and now appeals, contending the trial court erred in determining venue and in admitting evidence of alleged prior abusive acts toward his family. Pro se, he argues that

he was entrapped, prosecuted by a vindictive prosecutor, unlawfully denied bail, unlawfully denied a competency hearing, denied due process when the State moved to exclude defense witnesses, and prejudiced by ineffective assistance of counsel. In his consolidated personal restraint petition, Mr. Blakely additionally alleges the State withheld exculpatory evidence and the trial judge was biased. His motion for an order of release is also referred to us.

Because elements of the crime of solicitation were committed in Grant County, venue was proper in that county. We also conclude that the trial court properly balanced the probative value against the prejudicial impact of the prior acts of misconduct admitted at trial. Further finding no evidence to support Mr. Blakely's pro se issues, we affirm his convictions and dismiss his personal restraint petition. The pro se motion for an order of release is denied.

Facts

In 1998, after Mr. Blakely's wife Yolanda filed for divorce, he abducted her from their orchard home in Grant County, locked her in a wooden box, and transported her to Montana. *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Mr. Blakely was charged with first degree kidnapping. While awaiting trial in the Grant County jail, he allegedly met another inmate, convicted thief Robbie Juarez. According to Mr. Juarez, Mr. Blakely offered him \$10,000 to kill Yolanda. Hoping to

Nos. 24035-5-III; 25010-5-III
State v. Blakely

scam Mr. Blakely, but with no serious intent to commit the murder, Mr. Juarez allegedly pressed for more details on how he would be paid. Mr. Blakely claimed to have money buried in a secret location.

In July 2000, Mr. Blakely pleaded guilty to second degree kidnapping involving domestic violence and use of a firearm. *Id.* at 298-99. The trial court imposed an exceptional sentence based on deliberate cruelty. *Id.* at 298.

Mr. Juarez and Mr. Blakely met up again in 2002, while both were incarcerated at the Airway Heights Corrections Center in Spokane County. At this time, Mr. Blakely was awaiting disposition of appeals that went to the Washington Court of Appeals and the United States Supreme Court. *State v. Blakely*, 111 Wn. App. 851, 47 P.3d 149 (2002), *rev'd*, 542 U.S. 296 (2004). After stating that his daughter Lorene had been instrumental in convicting him and that he wanted revenge, Mr. Blakely reportedly asked Mr. Juarez if he was still interested in killing Yolanda, and now Lorene. According to Mr. Juarez, the two then discussed details, including how to find the two women, communication through Pete and Mary Eriksen in Grant County after Mr. Juarez was released from confinement, payment of \$80,000 for the two murders, and Mr. Juarez's subsequent move to Mexico to avoid prosecution.

Mr. Juarez was released from Airway Heights in May 2003. When he was arrested three months later in Grant County for burglary, he was sent to Airway Heights

for 40 days on the probation violation. While there, he and Mr. Blakely briefly communicated their desire to pursue the murder-for-hire plan.

After his release from Airway Heights, Mr. Juarez still faced the burglary charges in Grant County. He decided to negotiate a deal based on the information he had on Mr. Blakely, and began to work with Grant County Sheriff's Detective David Matney on the Blakely investigation. Discarding Mr. Juarez's offer to return to prison with a body wire, Detective Matney arranged for Mr. Juarez to communicate by letter with Mr. Blakely, using a Grant County post office box for replies. Mr. Juarez's first letter to Mr. Blakely in October 2003 indicated interest in "goin to Mexico after all":

Ralph

Hey you old goat! Didn't expect to hear Huh? Told you I'd be in touch. So hows the appeal going. You gonna be out by Dec? Well as for me, I'm havin hell out here. I may be thinkin of goin to Mexico after all. Turns out my grandfather owns a ranch out in Monterrey, it needs some tending to. Plus the company Bunzl plastics I worked for in Yakima has a plant in Monterrey Mex. I want out of these damn states. What ya think lots a senioritas out in Mex for us, especially a young guy like you. I don't know. I maybe thinking of doin some traveling to Oregon, and Yakima maybe Texas before I go. What do you think? I need it as much as you do. I guess your right I could make a nice lil life in Mexico. I'm temp at a motel for now. You a good friend Ralph I'll trust you. We can later discuss a \$ arrangement. I plan on moving to Mexico soon I'd say by Spring time. Hey you got those addresses in Oregon, and Yakima. I wouldn't mind payin a friendly visit. Well buddy I'll write more later. Meanwhile I'm ready. I just need the addresses. so write me here [at] my p.o. box address. . . . Meanwhile so we can keep in touch. also I'll get you a number to call me so I know whats goin on ok. if you need anything let me know, except for \$ I have none but I may need to borrow some from you in the late future. Well take care you old goat and write me soon. send

Nos. 24035-5-III; 25010-5-III
State v. Blakely

it legal mail. smart move! Take care write soon.
Your friend,
Robbie Juarez
P.S. Mexico Here I come Yahooo!
P.S. My post office Box is 914 in Ephrata 98823
Plaintiff's Ex. 43.

In response to Mr. Juarez's letter, Mr. Blakely wrote the following letter in November 2003 from his cell at Airway Heights:

Dear Robbie
Received your letter. I believe my mail is being monitored. Please write (me letters) to Mary Eriksen—9532 S.W. "O" Road Royal City, Wa 99357.
Yes it would be great to live in Mexico.
The address of Lorene B. is 103 E Aktomin Road Union Gap Wash.
I will send you the other address (main) in next letter.
Why are you living in Ephrata? And for how long?
You can always keep in touch with me through long time friend Mary Eriksen.
The medication that I was on to sleep has screwed up my hand writing. I have funds for you.
Keep in touch
Your friend
Ralph B.

Plaintiff's Ex. 45. At this time, Lorene was living on Ahtanum Road in Union Gap.

Mr. Juarez wrote a second letter and dropped it off at the Eriksens' house for delivery to Mr. Blakely. He indicated that he was waiting for the second address:

Ralph
Hey buddy hows it goin. Any ways hope your hand is feeling better. As for me shit Ralph the damn system wont leave me alone. I'm sick and tired of this crap. Wich is why I haven't wrote you. I was in jail for some traffic tickets. Bullshit. Huh? Man I'm serious about getting out of here. I

want the easy life. What ever it takes to get there you already know. \$ the only thing is I don't think you old ass can hang with the senioritas but at least you'll go with a smile!! Ha Ha Ha!! Well I'm in Ephrata cause its cheaper to live! I can't live at moms. I'm an X felon and moms runs the Day care center remember. as for how long Ralph I don't really know till I get in trouble or go to Mexico and Mexico sounds alot better to me but hey I'll wait till your out. I'll lay low. No more getting in trouble till we can have some fun in the sun. Well I got the first address. I'll be visiting Yakima soon to see family so I can give a quick peek at the situation. Send the other when your ready. well Ralph, I can't wait to see ya. Mexico sounds like a dream come true. I'm tired here and am really countin on this so you keep your head up, be cool, and don't be beatin guys up in there. Take care write soon. I'll be in touch.

Your friend,
Robbie Juarez

Plaintiff's Ex. 44.

In a subsequent letter postmarked December 17, 2003 and mailed to the Grant County post office box, Mr. Blakely altered the plans:

Robbie,

Received your letter December 12. I have been trying to launder some small funds to Mary and Peat Eriksen. This is the only way possible, until I get out in July, 2004. Deep thought has brought me to think of only one main in Redmond, Oregon, and to forget about [blank, with the name "Lorene" erased] at Union Gap. It would be best to ["Yolanda B." written lightly in the margin] focus on 2151 N.W. Poplar Place, in Redmond. There is a husky 6' boy there; who is in the Redmond High School or away to college??

It takes a court action to get these small funds to flow once a month; which could amount to \$300-\$500 a month. Until I can be released in July, at that time I can roundup a larger amount. I'm working with the trustee in Spokane to get these funds once a month, beings the court has these funds tied up till I'm released.

This could interfier with my July release, if it is not handled cautiously and carefully. If all had gone timely with my U.S. Supreme

Nos. 24035-5-III; 25010-5-III
State v. Blakely

Court action, I should have been released in December but now maybe April, 2004.

I wish that I could have slipped a few thousand in this envelope with direct delivery. Mary or Peat don't know anything, but believe that I owe you some.

Once the funds are started I could have them mailed to Mexico until my July release.

best regards Your friend,

Ralph

Plaintiff's Ex. 46. Yolanda was living at the Redmond address at this time with the couple's son.

In June 2004, Mr. Blakely was charged in Grant County with one count of solicitation to commit first degree murder, RCW 9A.32.030(1)(a); RCW 9A.28.030(1).

The information alleged that Mr. Blakely,

in the County of Grant, State of Washington, between September 1 and November 2, 2003, with intent to promote or facilitate the commission of the crime of Murder in the First Degree, did offer or give money . . . to another to engage in specific conduct, to wit: with premeditated intent to cause the death of Yolanda Blakely, a human being.

Clerk's Papers (CP) at 1. The amended information filed in October 2004 added a second count alleging commission of the same crime between the same dates with the intent to cause the death of Lorene Blakely. A second amended information changed the dates to "on or about September 1, 2003 through December 31, 2003." CP at 78.

Pretrial, Mr. Blakely moved for a change of venue from Grant County to Spokane County. This motion was denied after a hearing. The State moved to admit evidence of

prior misconduct, including acts of violence against Yolanda and the children, acts of fraud, frivolous lawsuits, threats, the previous kidnapping and assault of Yolanda, and a prior attempt to hire persons to kidnap and/or kill Yolanda and Lorene. Most of these prior bad acts were excluded at trial, with the exception of general information about aggression toward his family, the kidnapping case, the divorce litigation, and the prior attempt to solicit someone to murder Yolanda. This earlier attempt to solicit was elicited from witness Michael Phillipson, who testified that in late 1997 Mr. Blakely had asked him if he knew someone who would get rid of Yolanda for \$10,000. According to Mr. Phillipson, Mr. Blakely said he would love to see his wife brought to him in a gunnysack.

The jury found Mr. Blakely guilty of both charges and judgment was entered on March 22, 2005, sentencing him to a total of 420 months. This appeal timely followed, and was consolidated with Mr. Blakely's personal restraint petition.

Venue

Mr. Blakely first contends the trial court erred in denying his motion to change venue from Grant County to Spokane County. He argues that the crime of solicitation to commit first degree murder was committed at Airway Heights, in Spokane County. Even if elements of the crime were committed in Grant County, he maintains alternatively, he is entitled to change venue pursuant to CrR 5.1(c).

Criminal defendants are guaranteed under the Washington Constitution the right to

Nos. 24035-5-III; 25010-5-III
State v. Blakely

a speedy public trial by an impartial jury from the county where the offense is charged to have been committed. Wash. Const. art. I, § 22. CrR 5.1(a) provides that all criminal actions must be commenced in the county where the offense was alleged to have been committed or in any county where an element of the offense was committed. If there is a reasonable doubt whether the offense was committed in one of two or more counties, the action may be brought in any of those counties. CrR 5.1(b). When a case is filed under section (b), the defendant has the right to change venue to any other county where the offense may have been committed. CrR 5.1(c). We review the trial court's decision denying a motion for change of venue for abuse of discretion. *State v. Rockl*, 130 Wn. App. 293, 297, 122 P.3d 759 (2005) (citing *State v. Olds*, 39 Wn.2d 258, 235 P.2d 165 (1951)).

The charged crime of solicitation to commit first degree murder requires the State to prove the elements of (1) an offer to pay another to engage in specific conduct that would constitute first degree murder, and (2) an intent to promote or facilitate the murder. RCW 9A.28.030(1). A person is guilty of first degree murder if, with premeditated intent, he or she causes the death of a person or a third person. RCW 9A.32.030(1)(a). Mr. Blakely contends the elements of the offense were completed when he and Mr. Juarez discussed in Airway Heights the offer to kill Yolanda and Lorene. This series of discussions occurred some time during Mr. Juarez's incarceration at Airway Heights from

Nos. 24035-5-III; 25010-5-III
State v. Blakely

October 2002 until his release in May 2003. A brief exchange verifying that they had an agreement was made when Mr. Juarez was again incarcerated at Airway Heights for about a month, beginning August 25, 2003. However, Mr. Blakely was charged with committing solicitation to commit murder on or about the dates September 1, 2003 through December 31, 2003, covering the dates of the letters between him and Mr. Juarez.

Although the charge of criminal solicitation does not require the trier of fact to find an agreement to commit a crime—but merely an offer to another to commit a crime—the offer may be subject to protracted negotiations. This court must view the evidence and the inferences in the light most favorable to the State’s case. *State v. Clapp*, 67 Wn. App. 263, 270, 834 P.2d 1101 (1992). Accordingly, Mr. Juarez’s testimony indicates that the details of the specific conduct Mr. Blakely wished from Mr. Juarez, as well as the method of payment, were not established while Mr. Juarez was still at Airway Heights. In the December 17, 2003 letter sent to the Grant County post office box, Mr. Blakely specified that he wanted Mr. Juarez to “focus” on Yolanda now, rather than on Lorene, that he could offer only \$300 to \$500 a month until he was released from prison, and that he would “launder” these funds through the Eriksens in Grant County.

Plaintiff’s Ex. 46. Mr. Blakely directed Mr. Juarez to send communication to him through Mary Eriksen. Both letters contained necessary specific information of the

potential victims' addresses. This evidence is sufficient to show that the offer to "engage in specific conduct" constituting first degree murder arose in the letters directed to Grant County. RCW 9A.28.030(1).

Mr. Blakely chose to communicate with Mr. Juarez through the Eriksens, in Grant County. Although it was the State's choice to set up Mr. Juarez's post office box in Grant County, Mr. Blakely chose to send his solicitation to Mr. Juarez at that address. In terms of the necessary elements of the offense of solicitation, the element of the offer was committed in Spokane County, while the element of the communication of that offer to another was committed in Grant County. RCW 9A.28.030(1). Consequently, venue was appropriate in either of the two counties. CrR 5.1(a).

Contrary to Mr. Blakely's argument, a criminal defendant does not have the right to change venue whenever an offense has been committed in two or more counties. Under the plain terms of the rule, CrR 5.1(c) applies only if there is a reasonable doubt whether the offense was committed in one of two or more counties. CrR 5.1(b), (c); *Rockl*, 130 Wn. App. at 298. When it is clear that elements of the offense were committed in more than one county, venue is proper in either county under CrR 5.1(a). Such was the case here. Because there was no reasonable doubt whether the criminal solicitation occurred in one of two or more counties, Mr. Blakely had no right to change venue. *Rockl*, 130 Wn. App. at 298-99.

Mr. Blakely's arguments raised for the first time in the reply brief—that the State must be alleging separate acts of solicitation in each of the letters, and that the jury was not instructed to reach a unanimous verdict on these separate acts—are without merit.¹ The State alleged solicitation of a single crime in each count: the first degree murder of Yolanda or Lorene. That the details of the specific act of murder were developed over time did not mean that each discussion constituted a new solicitation. The jury was instructed to unanimously agree on a verdict for each count. There is no evidence that the verdict was not unanimous. *See Clapp*, 67 Wn. App. at 270-72.

Prior Acts of Misconduct

Mr. Blakely next assigns error to the trial court's admission of evidence of prior misconduct. He contends the cumulative effect of testimony about his physical abuse of his family and an alleged prior attempt to criminally solicit Mr. Phillipson was intended to convince the jury that he was a violent man.

The State moved in limine for admission of 27 separate incidents of misconduct dating from as early as 1974, the date when Mr. Blakely allegedly threatened Yolanda's parents with a firearm. After hearings, the trial court decided to allow admission of four of those incidents and limited those four to general information about arguments, disputes

¹ The issue of jury unanimity generally may be raised for the first time in a reply brief. *State v. Kitchen*, 46 Wn. App. 232, 234, 730 P.2d 103 (1986), *aff'd*, 110 Wn.2d 403, 756 P.2d 105 (1988).

over money, and physical abuse involving Yolanda and Lorene. These admitted incidents included (1) yelling at, slapping, and pulling the hair of Yolanda; (2) routinely berating Yolanda and the children; (3) Mr. Blakely's behavior during the divorce proceedings and asset litigation; and (4) his 1997 attempt to hire persons to kidnap or kill Yolanda and Lorene. A fifth incident—the 1998 kidnapping and assault of Yolanda and their son—was admitted only in general terms, particularly relating to Lorene's role in apprehending Mr. Blakely and Yolanda's role in testifying at sentencing. Mr. Blakely objected to admission of these prior acts.

Evidence of other crimes, wrongs, or acts is generally inadmissible to prove character or to show action conforming to those acts. ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Such evidence may be admissible, however, for such purposes as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). If admitted for one of these purposes, the trial court must identify the purpose and determine whether the evidence is relevant and necessary to prove an element of the crime. *Powell*, 126 Wn.2d at 258. Additionally, the trial court must determine on the record whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997); *Powell*, 126 Wn.2d at 264. The trial court has broad discretion in balancing the probative value against the prejudicial

effect. *Stenson*, 132 Wn.2d at 702. This court will not disturb the trial court's decision on the admissibility of evidence absent an abuse of discretion. *Id.* at 701; *Powell*, 126 Wn.2d at 258.

Here, the trial court examined multiple incidents of prior misconduct and discarded most of them as unfairly prejudicial. The remaining incidents were admitted because the trial court concluded they were relevant to Mr. Blakely's motive for soliciting the murders of Yolanda and Lorene.

Generally, motive is relevant to a homicide prosecution. *Stenson*, 132 Wn.2d at 702. It follows that motive is also relevant to a prosecution for solicitation of first degree murder. Motive is the impulse that tempts or induces a mind to commit a crime. *Powell*, 126 Wn.2d at 259-60; *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998). Evidence of previous quarrels and assaults against the same victim is admissible when motive is relevant to the current offense. *Powell*, 126 Wn.2d at 260.

Mr. Blakely was charged with soliciting the murders of his wife and daughter. Although motive is not an element of that offense, it is relevant to cases such as this, when guilt is established by circumstantial evidence. *Id.* The relationship of the victim to the accused also bears upon premeditation and malice. *Stenson*, 132 Wn.2d at 702. Mr. Blakely's hostile relationship with Yolanda and Lorene and abusive acts toward his family established a powerful motive for his solicitation of their murders. This evidence

was not only relevant, but necessary to explain how Mr. Blakely's anger over losing control over his finances and family led to such a drastic solution.

The record shows that the trial court carefully considered the relevance of every prior act offered by the State, balanced the probative value against the danger of unfair prejudice, and accordingly rejected most of the incidents as too prejudicial. The court admitted the remaining incidents of misconduct with reservations, cautioning the State's witnesses to limit their testimony to general information regarding arguments, physical abuse, and the previous kidnapping. We find no abuse of discretion.

Entrapment

Mr. Blakely raises several pro se issues. In the first category of these issues, he contends the State violated his right to be free from unreasonable search by directing Mr. Juarez to induce him to commit the crime and by moving Mr. Blakely into Mr. Juarez's unit at Airway Heights. He also alleges that the State violated certain communication rules by having Mr. Juarez send him letters at Airway Heights. He appears to be arguing entrapment.

The affirmative defense of entrapment, codified from the common law in RCW 9A.16.070, alleges that the crime originated in the minds of the police or an informant and that the defendant was induced to commit the crime, which he was not predisposed to commit. *State v. Lively*, 130 Wn.2d 1, 9-10, 921 P.2d 1035 (1996). Although entrapment

Nos. 24035-5-III; 25010-5-III
State v. Blakely

involves objectionable police conduct, it does not implicate a defendant's constitutional rights. *Id.* at 11; *State v. Whitney*, 96 Wn.2d 578, 580-81, 637 P.2d 956 (1981). The defendant bears the burden of proving entrapment with a preponderance of the evidence. *Lively*, 130 Wn.2d at 13.

Mr. Blakely moved pretrial to dismiss the charges on the basis of entrapment. He argued there, as he did at trial, that Mr. Juarez was a longtime informant for law enforcement officers and was working under their direction when he approached Mr. Blakely and offered to murder Yolanda and Lorene. Mr. Blakely further alleged that when he refused to discuss this scheme, Mr. Juarez threatened to tell authorities of a purported solicitation, unless Mr. Blakely revealed the addresses of the proposed victims and gave Mr. Juarez money. These allegations are supported only by Mr. Blakely's statements and are rebutted by the testimony of Mr. Juarez and the evidence of Mr. Blakely's handwritten letters. He fails to show entrapment with a preponderance of the evidence.

Due Process

Another category of pro se issues alleges due process violations. Mr. Blakely contends he was denied due process when the trial court set excessive bail; did not provide an "indentification [sic] hearing" or a "Preliminary Determination Hearing"; did not provide a definite date, place, and time in the information; and did not rule on his

pretrial motions to dismiss. Statement of Additional Grounds at 5.

“Due process protects against the deprivation of life, liberty, or property.” *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 411, 114 P.3d 607 (2005) (citing U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3). This court’s threshold question is whether Mr. Blakely has been deprived of a protected interest in life, liberty, or property. *Id.*

I. Excessive bail. Washington’s constitution guarantees a right to bail. Wash. Const. art I, § 20; *Westerman v. Cary*, 125 Wn.2d 277, 287, 892 P.2d 1067 (1994). The trial court set bail for Mr. Blakely at \$3 million. Mr. Blakely was not deprived of his constitutional right to bail and he does not muster argument why \$3 million was excessive, considering the gravity of his offenses. Moreover, this argument is moot because he was convicted.

II. Preliminary hearings. It is unclear what Mr. Blakely is referring to as the “indentification” and preliminary determination hearings. He appears to contend he was entitled to a probable cause hearing. CrR 3.2.1(a) provides that an arrested person must have a determination of probable cause within 48 hours following arrest. This judicial determination may be made on affidavits and other law enforcement evidence, and does not require a formal hearing. CrR 3.2.1(b). Mr. Blakely was arrested upon probable cause alleged in the information filed a week earlier. He does not show that his right to a determination of probable cause was violated.

III. Information. The first information indicated that Mr. Blakely was charged with criminal soliciting in Grant County between September 1 and November 2, 2003. The date was later extended to December 31, 2003. Mr. Blakely contends the information does not provide a definite date, time, and place.

An information must contain a plain, concise, and definite statement of the essential facts constituting the offense so that the accused can prepare a proper defense. CrR 2.1(a)(1); *State v. Rhinehart*, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979); *State v. Davis*, 60 Wn. App. 813, 816-17, 808 P.2d 167 (1991), *aff'd*, 119 Wn.2d 657, 835 P.2d 1039 (1992). All of the informations filed against Mr. Blakely contained a clear statement of the alleged acts constituting the offense, and provided adequate descriptions to apprise him of the time frame and location of these acts.

IV. Rulings on pretrial motions. Mr. Blakely contends the trial court did not review or rule on his pretrial motions to dismiss for entrapment and prosecutorial vindictiveness. The State filed a response to the motion related to prosecutorial vindictiveness, and the trial court denied the motion during the pretrial hearing on March 2, 2005. As noted above, entrapment is an affirmative defense that was not proper grounds for a motion to dismiss. *Lively*, 130 Wn.2d at 9-10. Accordingly, the trial court's failure to formally rule on that motion was at most harmless error.

Competency Hearing

Mr. Blakely next contends the trial court erred in failing to hold a competency hearing. A trial court is required to conduct a competency hearing whenever the court makes a threshold determination that there is reason to doubt the defendant's competency. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991) (quoting RCW 10.77.060(1)). This determination is within the discretion of the trial court. *Id.* Mr. Blakely never raised the issue of his competency, and his participation at trial apparently did not cause the trial judge to question his fitness. Even if this issue had been raised at trial, nothing in the record indicates that it would have been granted.

Prosecutorial Misconduct

Mr. Blakely contends the prosecutor made false and inflammatory remarks during the opening and closing arguments. He also asserts that the prosecutor personally vouched for the credibility of the State's witnesses, coached the testimony of the State's witnesses, and filed charges against him out of retaliation for his successful appeal of the exceptional sentence for his kidnapping conviction. These claims raise issues of prosecutorial misconduct and prosecutorial vindictiveness.

A defendant who alleges prosecutorial misconduct must establish both improper conduct and its prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The alleged improper comments must be viewed within the context of the prosecutor's entire argument, along with the issues and the evidence of the case. *Id.* A

Nos. 24035-5-III; 25010-5-III
State v. Blakely

prosecutor may summarize or draw inferences from the evidence. *Id.* at 579; *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). However, the prosecutor may not state his or her personal beliefs regarding the credibility of witnesses. *Dhaliwal*, 150 Wn.2d at 577-78. Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 578. If the defendant did not object to the improper statement, the issue is deemed waived unless the statement was so flagrant and ill-intentioned that the prejudice could not have been neutralized by a curative instruction. *Id.* (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Here, the prosecutor in opening and closing statements summarized the testimony of the witnesses and pointed out inconsistencies in Mr. Blakely's version of events. Mr. Blakely found the allegations of abuse, manipulation, and attempts to solicit people to kill his wife and daughter reprehensible; however, these allegations were based on sworn testimony. He did not object during the opening and closing statements, and he fails to show that the statements were false. His contention that the prosecutor vouched for the truthfulness of certain witnesses is not supported by the record. Accordingly, this issue is waived. *Id.*

A claim of prosecutorial vindictiveness asserts that a prosecutor vindictively filed a more serious crime in retaliation for a defendant's lawful exercise of a procedural right. *State v. Bonisisio*, 92 Wn. App. 783, 790, 964 P.2d 1222 (1998). Mr. Blakely contends

the Grant County prosecutor filed the criminal solicitation charges in retaliation for Mr. Blakely's successful appeal of his exceptional sentence in *Blakely*, 542 U.S. 296. He also claims the prosecutor coached the State's witnesses to lie. These allegations are unsupported by the record, which shows that the charges arose from Mr. Blakely's conduct in seeking a murderer-for-hire.

Ineffective Assistance of Counsel

The last of Mr. Blakely's pro se issues on appeal is his claim that he had ineffective assistance of counsel at trial. He claims that counsel failed to (1) adequately investigate the case, interview witnesses, subpoena witnesses, order transcripts of inconsistent statements, or check prison records to see what dates he could have talked to other inmates; (2) immediately appeal the venue ruling; (3) object to the lack of a definite statement of all elements in the information; (4) obtain expert evaluation of his mental and physical health; (5) object to witnesses who were felons; (6) record a telephonic interview of Mr. Juarez; (7) object to the prosecutor's prejudicial remarks; (8) impeach witnesses; and (9) object to testimony of unproved allegations of past behavior.

Criminal defendants are guaranteed the right to assistance of effective counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Applying the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant who claims ineffective assistance of counsel must show (1) that his

attorney's representation was deficient, and (2) that this deficiency was so serious that it deprived the defendant of a fair trial with a reliable verdict. *Woods*, 154 Wn.2d at 420-21; *Rockl*, 130 Wn. App. at 299. This court engages in a strong presumption that counsel's conduct was reasonably effective. *Rockl*, 130 Wn. App. at 299. Legitimate trial tactics or strategy will not support a claim of ineffective assistance of counsel. *Id.* Mr. Blakely fails to show either deficient representation or prejudice.

Many of Mr. Blakely's allegations are not supported by evidence in the record. A party who seeks review has the burden of supplying the court with all relevant information in the record. *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). Mr. Blakely contends his trial counsel did not make an adequate investigation, including interviewing and subpoenaing witnesses, ordering transcripts of inconsistent statements by witnesses, and checking prison records for dates he and Mr. Juarez had access to each other. He fails to show that additional witnesses were available and had relevant evidence, or to explain how transcripts of inconsistent statements would have advanced his case. The prison records would have been unnecessary, because Mr. Blakely filed a motion before trial admitting that he had discussed the idea of murder with Mr. Juarez while at Airway Heights. Mr. Blakely's contention that counsel should have obtained an expert evaluation of his mental and physical health is unsupported by any evidence that he had a need for such an evaluation. Finally, the record does not show that any

telephone conversation between defense counsel and Mr. Juarez could have been legally recorded or would have provided information that was not elicited at trial.

Other incidents of ineffective representation alleged by Mr. Blakely fall under the category of sound trial tactics. As demonstrated above, the trial court properly denied Mr. Blakely's motion to change venue. An immediate appeal of that decision would have been fruitless and a delay of trial. The information contained a definite statement of the essential elements of the crime, and any objection to it would have had no merit, as would any objection to witnesses who were felons. Their criminal history aided the defense attempts to impugn their credibility. These witnesses were vigorously impeached at trial, contrary to Mr. Blakely's assertion. Additionally, defense counsel did not object to the prosecutor's opening and closing statements because the prosecutor did not make any comments that were not supported by the evidence or that did not arise by inference from the evidence.

Personal Restraint Petition

Mr. Blakely raises several issues in his personal restraint petition. However, most of the same issues were raised by appellate counsel or in his pro se statement of additional grounds on appeal. Additional allegations in his personal restraint petition are that the trial judge was biased and that the prosecutor deliberately withheld prison records showing that he and Mr. Juarez were not at Airway Heights at the same time.

To prevail on a personal restraint petition, a petitioner must show (1) a constitutional error that resulted in actual and substantial prejudice, or (2) a nonconstitutional error that resulted in a complete miscarriage of justice. *Woods*, 154 Wn.2d at 409. The State's failure to disclose exculpatory evidence to the defense and to preserve such evidence is a violation of due process. *Id.* at 428. Such evidence should have been disclosed if there is a reasonable probability that it would have changed the result of the proceeding. *Id.*

Clearly the prison records here would not have changed the result of Mr. Blakely's trial, because he filed an affidavit before trial admitting that he met with Mr. Juarez at Airway Heights. The testimony of defense witnesses at trial attempted to show that Mr. Juarez approached Mr. Blakely at Airway Heights with the idea of a murder-for-hire. Not only are the prison records not exculpatory, but they are inconsistent with Mr. Blakely's sworn affidavit and defense.²

Further, the allegation that the trial judge was biased is unsupported by the record, which shows that the judge limited evidence of prior acts of misconduct so as to guard against undue prejudice. Because Mr. Blakely shows neither error nor prejudice, his personal restraint petition is dismissed.

² Mr. Blakely's motion for extension of time to file evidentiary documents is accordingly denied.

Order of Release

Mr. Blakely moved this court for an order of release. He based his motion on RAP 16.4(c), arguing that his conviction was entered without jurisdiction, his conviction was the result of vindictive prosecution, confinement is cruel and unusual punishment for a person of his age and health, and he does not have access to a typewriter or legal research. The State responds that Mr. Blakely has raised no issues on appeal that suggest the jury's verdict is so unjust that release is justified pending appeal. As the State argues above, the jurisdiction and prosecutorial vindictiveness issues have no basis in fact, Mr. Blakely has been diagnosed a malingerer by expert evaluators throughout his legal battles (*see Blakely*, 111 Wn. App. at 858-59), and the county clerk has been accommodating when he has trouble filing timely documents. Accordingly, the motion for an order of release is denied.

Affirmed; the personal restraint petition is dismissed; the motion for an order of release is denied.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Nos. 24035-5-III; 25010-5-III
State v. Blakely

Schultheis, A.C.J.

WE CONCUR:

Kato, J.

Kulik, J.